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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MONICA GREENE, *et al.*,

Petitioners,

v.

DANIEL J. PODBERESKY,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Questions Presented for Review

1. Whether a State -- that maintained a *de jure* segregated higher education system for more than a century; that for a generation after *Brown v. Board of Education* took few meaningful steps to dismantle the dual system, acting only when threatened by federal officials with loss of funding; that had not been released from its remedial obligations by federal authorities; that continued to operate the same racially identifiable institutions that existed under the dual system; and that had been unsuccessful in prior efforts to increase the low level of African-American enrollment and graduation at its historically white "flagship" institution or to alter the longstanding climate of hostility to blacks on that campus -- was justified in 1989, as part of its desegregation plan, in continuing to award a small number of scholarships to high-achieving African-American students at that campus.

2. Whether the court below erred in holding, contrary to the decision in *Bazemore v. Friday*, 478 U.S. 385 (1986), that statistical evidence of underrepresentation lacks any probative value on the issue of discrimination unless every imaginable explanatory factor is included in the calculation.

3. Whether the Court of Appeals "departed from the accepted and usual course of judicial proceeding," SUP. CT. R. 10.1(a), disregarded the requirements of FED. R. CIV. P. 56(c), and misapplied the teachings of this Court when, after having found that there were genuine disputes about facts material to the parties' cross-motions for summary judgment, it not only reversed the trial court's summary disposition in favor of the defendant parties but also directed that on remand, summary judgment should be entered for the plaintiff.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Monica Greene, *et al.*, defendant-intervenors in the trial court and appellees below,[1] respectfully pray that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this matter.

Opinions Below

The initial opinion of the District Court is reported at 764 F. Supp. 364 (D. Md. 1991) and is reprinted in the

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[1]The parties to this litigation are: Daniel J. Podberesky (the plaintiff); William E. Kirwan, President of the University of Maryland at College Park, the University of Maryland at College Park (UMCP) (the defendants); Monica Greene [the surname is misspelled in the Court of Appeals' caption], Maudlyn George, on her own behalf and on behalf of her daughter Allison George, Eileen Heath, Richard A. Dalgetty, Gerard W. Henry, Maisha Herren, Aletha S. McRae, on her own behalf and on behalf of her daughter Daletha McRae, and Charles L. Smith, III, on his own behalf and on behalf of his son, Charles Smith, IV (the defendant-intervenors).

Appendix[2] [hereinafter cited as "__a."] at 109a-138a. The opinion of the United States Court of Appeals for the Fourth Circuit reversing and remanding is reported at 956 F.2d 52 (4th Cir. 1992) and appears at 96a-108a. The opinion of the District Court on remand is reported at 838 F. Supp. 1075 (D. Md. 1993) and is found at 34a-95a. The opinion of the United States Court of Appeals for the Fourth Circuit, of whose judgment review is sought, is reported at 38 F.3d 147 (4th Cir. 1994) and is printed at 1a-29a. The Order of the United States Court of Appeals for the Fourth Circuit denying timely filed petitions for rehearing, three Judges dissenting, is reported at 46 F.3d 5 (4th Cir. 1994) and is reprinted at 30a-33a.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The Order denying the petitions for rehearing was entered December 30, 1994 (30a).

Constitutional and Statutory Provisions Involved

This case involves the Fourteenth Amendment to the United States Constitution and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; the text of each is set out at 221a-222a.

Statement of the Case

This suit was brought by Daniel Podberesky, a white student of Hispanic descent who in 1989 was granted admission to the Fall, 1990 undergraduate class at the University of Maryland at College Park ("UMCP") but was

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[2]Although defendant-intervenors Greene, *et al.* and defendants Kirwan and University of Maryland at College Park are filing separate Petitions for Writs of Certiorari, a single Appendix containing the rulings below and other materials required by SUP. CT. R. 14.1(k) has been prepared for both Petitions.

held ineligible to receive a Benjamin Banneker scholarship to the school because the Banneker program was limited to African Americans in accordance with a plan adopted by the State of Maryland to desegregate its institutions of higher education.[3]

Maryland's* de jure *segregated system of higher education

Maryland has a typically extensive history of segregation in higher education, dating to Colonial times.[4] The first public institutions of higher learning that received public funds (from 1782 to 1810) were open only to whites (UX 70 at 138). Later in the 19th century, the State resumed chartering and funding higher education institutions and professional schools which were available only to whites

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[3]One of plaintiff's parents is from Costa Rica. He originally claimed that the Banneker Program at UMCP should have been available to persons of Hispanic descent, whom he asserted were also victims of prior discrimination, as well as to African Americans. This claim was not passed upon by the District Court nor presented to or decided by the court below. *Cf.* 764 F. Supp. at 378, 136a-137a (rejecting similar claim with respect to Key Scholarship program).

[4]State authorities admit that prior to 1865, despite having the largest number of free blacks of any southern state (UX 70 at 38), all of the educational opportunities provided by the State were "in favor of the white race" -- there being no colleges for blacks or evidence that the white institutions enrolled blacks (IX 4 at 127). (Citations in the form "UX __" and IX __" are to exhibits to the defendants' and defendant-intervenors' 1993 Motions for Summary Judgment.)

Following the Civil War, the legislature of the State of Maryland refused to ratify the Fourteenth Amendment to the Constitution, Md. Sen. J. 808 (1867); Md. House J. 1141 (1867), and in 1870 enacted a new Public Education Act extending free public education to "[a]ll white youth between the ages of six and twenty-one years" (previously limited to age nineteen) and maintaining separate schools for "colored children" between the ages of six and twenty. 1870 Md. Laws Ch. 311 (Public Education Act of 1870); *see also* 1865 Md. Laws Ch. 160; 1868 Md. Laws Ch. 407; 1872 Md. Laws Ch. 377; 1878 MD. REV. CODE, Art. 27, §§ 95, 98.

(*id.* at 138-39), including, in 1859, the Maryland Agricultural College (now UMCP), which became the State's land-grant institution under the 1862 Morrill Act, 7 U.S.C. §§ 301 *et seq.* (1988 & Supp. V 1993). The school was open only to white males until 1916, when it admitted white females. (UX 70 at 141-42). Between 1866 and 1909 four higher education institutions for blacks, all founded by religious groups, were chartered by the State but received little if any state aid (*id.* at 141).[5]

By 1937, the State Commission on the Higher Education of Negroes found that of the four schools providing education for blacks, only one was accredited and that instruction in all was "considerably inferior" to that in the white institutions; the Commission recommended that the only state college for blacks, Princess Anne Academy, "had far better be abandoned altogether than continue its present pretense as a college" (IX 4 at 11-12, 26-27). In response to pressure to address these inequities or desegregate, Maryland chose to pay for a limited number of African Americans to attend out-of-state institutions rather than inegrate its own colleges and universities (IX 5 at 93-95).[6] Finally, in the early 1950's several blacks successfully sued for admission to UMCP. *E.g.*, *McCready v. Byrd*, 195

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[5]Even after the 1890 Morrill Act required Maryland to designate a land-grant college for African Americans in order to receive federal land-grant aid, it appears that the State failed to allocate funds to the black institution, instead allowing all state funding to flow to UMCP (IX 4 at 136).

[6]The first court challenge to Maryland's *de jure* segregated higher education system came after the State denied Thurgood Marshall admission to its law school, *see* CARL T. ROWAN, DREAM MAKERS, DREAM BREAKERS 45-46 (1993). After graduating from Howard Law School, Marshall won an order directing the admission of Donald Murray to the University of Maryland Law School. *Pearson v. Murray*, 169 Md. 478, 182 A. 590 (1936).

Md. 131, 73 A.2d 8, *cert. denied*, 340 U.S. 827 (1950); *see also* UX 70 at 154; IX 6.

After the decision in *Brown*, University officials voted in 1954 to remove restrictions on black enrollment (UX 70 at 155), but took few steps in the ensuing two decades to change the racially dual character of the higher education system. Only when threatened with loss of funding by the federal government's Office for Civil Rights ("OCR") in the 1970's and early 1980's did Maryland begin to take steps to dismantle its dual system.[7]

In 1985, Maryland proposed a higher education desegregation plan that OCR accepted. The plan reflected OCR's strong encouragement of using "other-race" financial assistance (aid made available to students who are members of groups that are underrepresented at racially identifiable institutions operated under the dual system) as a desegregation tool. For the period 1985-89, over $7,900,000

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[7]In 1969, the Office for Civil Rights of the United States Department of Health, Education and Welfare notified Maryland that it was continuing to operate a racially segregated system of higher education in violation of Title VI (UX 71; *see* 43 Fed. Reg. 6658 n.2 (Feb. 15, 1978)). In so doing, OCR noted the racial identifiability of Maryland's colleges: three formerly white state colleges and UMCP had enrollments that were approximately 99% white, while the three formerly black schools and the Princess Anne campus of the University of Maryland had enrollments approximately 92% black (UX 71).

In 1975, the State brought an action against OCR to forestall formal Title VI enforcement proceedings, *Mandel v. HEW*, 411 F. Supp. 542 (D. Md. 1976), *aff'd*, 571 F.2d 1273 (4th Cir.), *cert. denied*, 439 U.S. 862 (1978). That litigation was dismissed in 1985 when OCR accepted a five-year desegregation plan from the State. Stipulation of Dismissal at 2, *Hughes v. United States Dep't of Education*, Civ. No. N-76-01 (D. Md. June 3, 1985). (The responsibilities of HEW's Office for Civil Rights were transferred to the Office for Civil Rights of the U.S. Department of Education following its establishment in 1980, 20 U.S.C. § 3441(a)(3) (1988 & Supp. V 1993); *see also* 20 U.S.C. § 3413 (1988).)

in other-race financial assistance was provided to students at all institutions; $2,387,065 at historically black schools and $5,586,103 at other institutions.[8] Although black enrollment at several historically white colleges, particularly UMCP, increased during the life of the plan, by 1990 more than 60% of black full-time undergraduate students in Maryland public colleges still attended one of the four historically black institutions (UX 43, Table B-8). African-American students made up 11.2% of UMCP's enrollment that year (UX 21).[9]

The Banneker scholarship program

The Banneker Program was originally established by UMCP in 1978 as part of the State of Maryland's efforts to comply with the OCR requirement that it dismantle its segregated system of higher education. In 1980, OCR concluded that the State's efforts were still inadequate and ineffective. The agency specifically directed Maryland's attention to the low enrollment of black students at traditionally white colleges, including UMCP (UX 81, at 9-10). Five years later, OCR explicitly recommended that the State increase the number and amount of need- and merit-based scholarships designated for African Americans enrolled at UMCP (UX 84, attachment at 3).

The Banneker scholarships originally provided $1000 per year for two years to minority students at UMCP. They were subsequently expanded to provide four years'

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[8]Appendix C to Brief of *Amicus Curiae* United States Department of Education, *Podberesky v. Kirwan*, Civ. No. JFM-90-1685 (D. Md., filed July 27, 1993).

[9]OCR has not yet made a determination whether Maryland's higher education system is in compliance with the requirements of Title VI. The agency has announced that it will apply the standards of this Court's ruling in *United States v. Fordice*, ___ U.S. ___, 112 S. Ct. 2727 (1992), to pending Title VI evaluations of the expired plans of six states, including Maryland. 59 Fed. Reg. 4271-72 (Jan. 31, 1994).

undergraduate support (IX 20, at 231a) and in 1981 to provide full (in-state) tuition (UX 59, Chart 1). In 1988, eligibility for the Banneker program was restricted to African-American students and the amount of aid was increased to provide support for all costs normally associated with matriculation at UMCP. However, in the 1990-91 school year, the cost represented only one per cent of total financial aid available to UMCP students (*Id.*; UX 62; *see also* 838 F. Supp. at 1077, 35a-36a).

At the time plaintiff applied, eligibility for Banneker scholarships was restricted to African-American students who had been admitted to UMCP and who had a minimum high school grade-point average of 3.0 and minimum SAT score of 900.[10] UMCP selected, from among applicants meeting these criteria, those who also demonstrated characteristics that had been found to correlate better than grades and standardized test scores with retention and graduation of black students at UMCP (UX 47 ¶ 17 [affidavit of Banneker Committee chair]; *see also* UX 15 at 4 [study by UMCP professor]; UX 6 at 14-15 [study by Dr. Walter Allen, UCLA, commissioned for this case]).

The selection process brought to UMCP, as Banneker Scholars, black students who have completed their studies and graduated with honors at rates closest to those for white students (UX 43 at 13 [study by Dr. William Trent, University of Illinois]). Recipients of Banneker scholarships do far more than just graduate with honors; they also serve as tutors and mentors to other African-American students at UMCP and frequently participate in the school's recruiting efforts that are directed toward high schools with substantial

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[10]838 F. Supp. at 1077, 35a-36a. UMCP also awards full-cost, merit-based Francis Scott Key scholarships without any racial restriction. *Id.* at 1095, 83a. However, Mr. Podberesky did not qualify for a Key scholarship for 1990. 764 F. Supp. at 377, 134a.

black student enrollments (UX 6 at 21; UX 9 ¶ 31, UX 12 ¶ 14 [affidavits of Director and Assistant Director of Undergraduate Admissions at UMCP]). A study of African-American students' persistence and graduation from 1974 through 1992 indicated that the Banneker scholarships were an important factor in increasing blacks' enrollment and success at UMCP (UX 43 at 18 [Trent]). As the District Court found (838 F. Supp. at 1094-95, 82a-83a):

> Continuation of the Banneker Program thus serves to enhance UMCP's reputation in the African-American community, increase the number of African-American students who might apply to the University, improve the retention rate of those African-American students who are admitted and help ease racial tensions that exist on the campus.

Initial litigation

Respondent's complaint alleged that restriction of Banneker scholarships in 1990 to black students violated, *inter alia*, the Fourteenth Amendment's Equal Protection Clause and Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d. Following discovery, the parties (then limited to the respondent, and UMCP and its President) filed cross-motions for summary judgment. On May 15, 1991, the District Court granted summary judgment in favor of the University. It held that while the operation of the Banneker program was subject to the "strict scrutiny" analysis of *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the requirements of that analysis were satisfied.

The district court ruled that Maryland had a compelling justification for adopting the Banneker program as a means of remedying its own prior discrimination against African Americans in the operation of its higher education system. The court pointed to OCR's findings that Maryland violated Title VI, to the protracted enforcement proceedings,

and to the fact that the federal enforcement agency had not yet made a determination that the State had met its remedial obligations under Title VI. 764 F. Supp. at 371-73, 122a-125a. The court stated that "there must be continuing effects of past discrimination to justify a race-conscious remedy," *id.* at 374-75, 129a, and that plaintiff offered "some evidence" that by 1989 the State's implementation of its 1985 desegregation plan had been effective at UMCP. Nevertheless, the court found that there was no triable issue as to whether UMCP officials in 1989 had a "strong basis in evidence" for concluding that the effects of their prior discrimination had not yet been eradicated, particularly in light of the fact that OCR had not made a determination to the contrary. *Id.* at 372, 123a [*citing Croson*, 488 U.S. at 500], 375, 130a. It also held the Banneker Program to be "narrowly tailored," as required by *Croson* and other rulings of this Court. *Id.* at 375-76 (130a-133a).

The Court of Appeals reversed, because it determined that the district court "failed to make a [sufficiently] specific finding" that there were continuing effects of the prior discrimination at the time respondent was held ineligible for a Banneker scholarship in 1989. 956 F.2d at 57, 106a. It emphasized the need for a careful review of the facts (*id.*):

> In determining whether a voluntary race-based affirmative action program withstands scrutiny, one cannot simply look at the numbers reflecting enrollment of black students and conclude that the higher educational facilities are desegregated and race-neutral or vice versa. It may very well be, given the complexities of institutions of higher education and the limited record on appeal, that information exists which provides evidence of present effects of past discrimination at UMCP, but no such evidence was brought to our attention nor is it part of the

> record. . . . Should no further evidence be available upon remand, summary judgment for appellant would be appropriate.

The Court of Appeals did not reach the "narrowly tailored" issue, *id.* at 57 n.7, 107a n.7.

Proceedings after remand

When the case returned to the District Court in 1992, the present Petitioners (six African-American UMCP student recipients of Banneker scholarships and two African-American high school students who were potential applicants to UMCP) were permitted to intervene as defendants. The University of Maryland conducted an extensive administrative fact-finding review of the Banneker program in which all parties to this litigation were invited to participate. On April 26, 1993, the University issued a formal *Decision and Report* (139a-220a), accompanied by extensive supporting exhibits, which concluded that *in 1989 and in 1993* continuing effects of the racially discriminatory dual system persisted at UMCP and influenced the enrollment decisions of African-American students (*cf. Fordice*, 112 S. Ct. at 2737).

These materials, along with additional affidavits, declarations and documentary evidence, were presented to the District Court in connection with cross-motions for summary judgment again filed by both sides in the case, following an additional discovery period.[11] On November

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[11]The defendant parties deposed both of plaintiff's designated expert witnesses, neither of whom indicated familiarity with the facts and circumstances relating to the Maryland higher education system in general, or UMCP in particular. For example, Dr. Carl Cohen admitted that he had "conducted no independent study of . . . the extent to which past discriminatory actions with lingering effects were at any time eliminated as a consequence of the remedial actions taken by the University of Maryland" (IX 46 at 58) and that "I have been very careful

18, 1993, the District Court again granted summary judgment against respondent Podberesky. 838 F. Supp. 1075, 34a. In its opinion, the court first summarized the extensive history of official discrimination against African Americans in Maryland, including lack of access to opportunities for higher education; it then described the State's painfully slow response both to *Brown* and to the federal government's attempts to have the State dismantle its dual system of higher education. *Id.* at 1077-81, 36a-48a. The court thereafter turned to the four specific effects of the prior discrimination that the University had concluded, in its *Decision and Report*, persisted at UMCP: (1) the school's reputation within the black community as an institution at which African-American students were not welcome and would not succeed; (2) continuing underrepresentation of blacks in the student body; (3) persistent low retention and graduation rates of African-American students at UMCP; and (4) a racially hostile campus climate. *Id.* at 1082, 50a.[12] Based upon the affidavits and declarations of University officials, faculty and students, and others, statistical data,

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in my previous answers to explain that I cannot speak with authority concerning the causal connections between previous events and the present" (*id.* at 124). Dinesh D'Souza testified that he had reviewed only one document prior to preparing his affidavit (IX 47 at 69-72, 78-80). On the basis of this discovery, the defendant parties moved to exclude evidence from plaintiffs' "experts," but the District Court did not rule on the motion and allowed affidavits from both individuals to be submitted with plaintiff's cross-motion for summary judgment.

[12]Defendant-intervenors also argued that the low number of black faculty at UMCP was traceable in part to the long-maintained dual system and exclusion of African-American students from opportunities for study leading to academic careers. The District Court did not address this argument, except to note that the "absence of African-American members of the faculty to serve as mentors" was a "significant contributing factor[]" to low retention rates for African-American students, 838 F. Supp. at 1091-92, 74a-75a.

and scholarly studies conducted at the defendant parties' request, the District Court concluded that "all four of UMCP's findings are supported by strong evidence." 838 F. Supp. at 1083, 52a. Specifically, the trial court determined that

> (a) there was substantial evidentiary justification for UMCP's conclusion in 1989 that the school continued to be viewed, in Maryland's black community, as a racially exclusionary institution based upon the personal experience and exposure of parents and other adults to its long history of segregation, resistance to integration, and prevalent atmosphere of hostility to African Americans on the campus, 838 F. Supp at 1084-87, 54a-62a;
>
> (b) the most appropriate statistical comparisons, taking into account UMCP's highly flexible admissions process,[13] indicated that African Americans continued to enroll as undergraduates at UMCP in numbers significantly below what might

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[13]Although UMCP considered whether applicants had high school diplomas, had completed a set of specified secondary education course offerings, had taken the SAT or ACT tests (and, if so, the scores they had achieved), and what their high school grade-point average was, each of these criteria was applied with great flexibility; indeed, applicants were admitted without any requirement that they meet any particular standard or level of performance as to any or all of these factors, but rather based upon individual assessment of their likelihood of succeeding in the school's program. (*Decision and Report* at 17, 173a-175a; UX 9 ¶¶ 6-9; IX 36 at 6-7, 17-19, 22-25; UX 108 [Admissions Criteria].) The District Court correctly concluded that "in fact, the University does not have rigid minimum admissions requirements," 838 F. Supp. at 1087, 64a. Nevertheless, the court did not "entirely disregard[]" the criteria but rather held that their existence and impact on the majority of admissions decisions required comparison of African-American enrollment rates with a pool more restricted than simply Maryland high school graduates, *id.* at 1089, 68a-69a.

reasonably be anticipated at Maryland's flagship institution in the absence of its racially exclusionary past and continuing negative reputation, *id.* at 1087-89, 63a-69a;

(c) there was "a strong evidentiary basis for th[e] finding" that black undergraduate students admitted to UMCP are disproportionately less likely than whites with similar credentials to remain enrolled and to graduate, due in part to factors connected with the University's prior discrimination, *id.* at 1091-92, 72a-75a; and

(d) "there is a strong evidentiary basis in the record to support" the finding that on the UMCP campus, a climate of hostility to blacks (inconsistent though it may be with the University's contemporary official policies and pronouncements) exists that in part reflects problems created by UMCP's past exclusion and discriminatory treatment of African Americans, *id.* at 1092-94, 75a-81a.

The District Court also found, as it had initially, that the Banneker Program was "narrowly tailored" to address these continuing effects of prior discrimination because the University's experience with "race-neutral" measures had been unsatisfactory, because the University will reconsider the need for its continuation at least every three years, because the proportion of UMCP financial aid subject to this racial restriction is minute, and because the scholarship program, while it appears to be succeeding (over time) in eliminating the continuing effects of discrimination, operates without impact upon the decision whether or not to admit *any* non-African-American applicant to the school, *id.* at 1095-96, 83a-87a. The court accordingly granted summary judgment in favor of defendants and defendant-intervenors and denied Podberesky's cross-motion.

The ruling below

The Court of Appeals again reversed. It disagreed with the trial court about whether the University was entitled to summary judgment on any issue. Interpreting the District Court's finding about UMCP's reputation in the black community as relating solely to pre-1954 absolute exclusion of undergraduate African-American students from the school, it ruled that *as a matter of law* this effect, even if traceable to the State's prior discrimination, could not justify a race-conscious remedy such as the Banneker Program. 38 F.3d at 154, 10a. The panel also disagreed with the District Court's conclusion that the hostile racial climate at UMCP was traceable to the dual system because "the [evidence] . . . do[es] not necessarily implicate past discrimination on the part of the University, as opposed to present societal discrimination," which was an insufficient ground for employing a race-conscious remedy, *id.* at 154, 11a.

With respect to the underrepresentation of African Americans in UMCP's student body, and retention and graduation rates, the panel held that summary judgment for defendant parties was improper because plaintiff had presented sufficient evidence to raise triable factual issues on these claims, *id.* at 155-57, 13a-18a.[14] The panel went further, however, holding that plaintiff's cross-motion for summary judgment should have been granted. In its view, there were several reasons the Banneker Program could not be said to be narrowly tailored, even assuming *arguendo* that defendants and defendant-intervenors had established that

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[14]Despite the District Court's finding, supported by uncontroverted evidence, that there were *no* rigid qualifications for admission to UMCP, see *supra* note 13, the panel ruled that "the district court should have determined what the effective minimum criteria for admission were by determining the lowest GPA and SAT scores achieved by admittees to the University that year," *id.* at 157 n.5, 16a n.5.

underrepresentation of blacks at UMCP and their disproportionate attrition were remnants of the State's past discrimination. *Id.* at 157-58, 18a-19a. First, according to the panel, "[h]igh achievers" -- such as recipients of Banneker scholarships -- "are not the group against which the University discriminated in the past," *id.* at 158, 20a. Second, the Banneker Program is open to non-residents of Maryland, *id.* at 158-59, 20a-21a. Further, the degree of underrepresentation (and, hence, the necessary duration of the program) cannot be sufficiently ascertained because

> the reference pool must factor out, to the extent practicable, all nontrivial, non-race based disparities in order to permit an inference that such, if any, racial considerations contributed to the remaining disparity,

id. at 160, 24a. Finally, the panel asserted, notwithstanding the affidavits and declarations of University officials, that the State had not shown that race-neutral alternatives to the Banneker Program had ever been employed in an effort to reduce attrition of African Americans, *id.* at 160-61, 26a-27a.

Rehearing *en banc* was denied on December 30, 1994, three judges dissenting without opinion (30a-33a).

REASONS FOR GRANTING THE WRIT

I

This Case Presents Issues of Extraordinary National Importance

As the preceding description indicates, this case is unlike any of this Court's recent decisions in the area of voluntary affirmative action, *e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Johnson v. Transportation*

Agency, 480 U.S. 616 (1987);[15] *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). In each of those cases, the existence of prior discrimination by the governmental agencies involved was either not admitted or not proven, and the issue before this Court concerned the nature of the State's interest and the showing -- short of proving past discrimination -- that would be necessary in order to justify the affirmative consideration of race or gender.[16]

Here, in contrast, Maryland's operation of separate institutions of higher education for blacks and whites, and its long delay after 1954 in taking any meaningful action toward dismantling that system, is undisputed. The genesis of the Banneker scholarship program in the course of Title VI administrative proceedings involving the desegregation of Maryland's university system is also undisputed. Thus the remedial purpose motivating the original adoption of the Banneker Program is unquestioned. The Court has not yet addressed the contours of permissible affirmative action in

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[15]Of course, *Johnson* involved only a Title VII claim, and not the Equal Protection Clause, 480 U.S. at 620 n.2, and the Court's opinion there applied a standard of justification for affirmative action that is less rigorous than that applicable in the constitutional context, *see id.* at 632-33 ("manifest imbalance" need not rise to level of "*prima facie*" case). However, the analysis is very similar to that in constitutional challenges, and Justice O'Connor, concurring in the judgment, specifically applied that analysis based upon her conclusion that the "*prima facie*" standard was satisfied on the facts of *Johnson*, 480 U.S. at 656.

[16]The instant case also differs from decisions involving the scope of the federal courts' equitable authority to impose race-conscious remedies, *e.g.*, *United States v. Paradise*, 480 U.S. 149 (1987); *Local No. 93 v. City of Cleveland*, 478 U.S. 501 (1986); *Local 28 v. EEOC*, 478 U.S. 421 (1986); *Firefighters v. Stotts*, 467 U.S. 561 (1984). *Cf. Local No. 93*, 478 U.S. at 526 (parties may consent to broader relief than court is empowered to order).

such circumstances.[17] It is imperative that it do so in this case, for lacking such guidance, the panel below mechanically applied the strict scrutiny test of *Croson*, a case in which no remedial purpose could be discerned, to diametrically contrary conditions.

There Is A Compelling Need for Race-Conscious Remedial Action at UMCP

Podberesky (and the panel below) focused their criticism upon the University's determination that effects of the dual system endured at UMCP and justified continued operation of the Banneker Program. As developed in the *Decision and Report* issued by the University in 1993, and in the evidence put before the District Court, salient characteristics of UMCP's historic mission and operation as a whites-only school have continued to affect the enrollment and retention of African Americans at the institution and to contribute to its racial identifiability, see *supra* pp. 6, 12-13; *cf. Fordice*, 112 S. Ct. at 2736-38 (policies and practices conceived in the era of the dual system may restrict or influence students' current institutional choices). For example, there was abundant evidence that UMCP continued to be burdened by its reputation as a once-totally segregated institution that only grudgingly admitted black students and which failed to provide them with the same kind of academic and other support systems available to whites,[18] and that African-American students still suffered

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[17]Seventeen southern and border states operated *de jure* segregated systems of higher education, faced federal pressure to dismantle those systems, and continue to struggle to eliminate the harmful remnants of their existence. *See, e.g.*, Gil Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal*, 72 MINN. L. REV. 29 (1987).

[18]The panel's view that UMCP's reputation in the African-American community stems solely from pre-1954 practices, 38 F.3d at 154, 10a,

much higher attrition rates than whites. The University designed the Banneker Program not merely to increase black enrollment -- as a simple admissions preference might have done -- but to address these underlying problems in a positive manner and *change* its reputation in the African-American community. Indeed, the University's Banneker Program minimizes its impact on non-black third parties because it is applicable only *after* admissions decisions are made and because it represents a very small proportion of total financial aid available to UMCP students.

Such carefully tailored voluntary actions by State officials to overcome the legacy of their constitutional violations deserve to be encouraged if the nation as a whole is ever to overcome its sorry history of discrimination. "The Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program." *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring in part and concurring in the judgment).

The panel below acknowledged that patterns of enrollment by race that originated prior to *Brown* and

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cannot be squared with the evidence. For example, the District Court quoted from the affidavit of a UMCP official (UX 10 ¶ 8) recounting conversations with teachers, principals and counsellors in Baltimore in which they reported not only their own negative experiences at College Park, but also "their former students['], whose feedback over the years indicated that life at UMCP had not significantly changed over time," 838 F. Supp. at 1085, 57a-58a. Similarly, a series of focus group interviews with randomly selected black parents indicated that contemporary racial incidents and the hostile climate at UMCP were as important as historical events in shaping the school's negative reputation in the African-American community (UX 7 at 8-14, 20-27 [report of Dr. Joe R. Feagin]), which led many parents to advise black high school students not to apply to UMCP (*id.* at 31-34).

continued into the 1970's persist in Maryland's higher education system, see *infra* note 23, suggesting that institutional choice in the State is not yet "wholly voluntary and unfettered," *Fordice*, 112 S. Ct. at 2737, *citing Bazemore v. Friday*, 478 U.S. 385, 407 (1986) (White, J., concurring). But the panel deprived the State of authority to address lingering influences upon choice. It held the University was powerless to undertake the Banneker Program for the purpose of extirpating its negative reputation within the African-American community and it trivialized the State's concern. Even if UMCP's negative reputation was attributable to prior segregation, the panel said, it was based upon "mere knowledge of historical fact [and] is not the kind of present effect that can justify a race-exclusive remedy. If it were otherwise, as long as there are people who have access to history books, there will be programs such as this one." 38 F.3d at 154, 10a.

But this Court recognized explicitly in *Fordice* that a state that formerly operated a dual system may "need . . . [to] take additional steps to ameliorate [racial] identifiability" that persists at its higher education institutions. 112 S. Ct. at 2736 n.4. As lower courts in higher education desegregation cases have perceived, if the remedy is to be effective such steps must include race-conscious measures. *E.g.*, Memorandum Opinion and Remedial Decree, *Ayers v. Fordice*, No. 4:75CV009-B-0 (N.D. Miss. March 7, 1995), at 167 n.365. *See id.* at 105-06, 108-12, 118 (approvingly noting, in discussion of steps taken to increase diversity and improve the racial climate,[19] the provision of special financial aid

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[19]The *Ayers* court said: "Ghosts of the past, which potentially have segregative effects by stimulating a climate nonconducive to diversity on the historically white campuses, include the lack of minority faculty as well as their absence in significant numbers in the top positions within Mississippi's academia . . . to some extent . . . a product of the *de jure* segregation," *Ayers*, slip op. at 117-18. *Cf. supra* note 12.

and scholarship opportunities for blacks at historically white institutions in Mississippi), 178-79 ¶¶ 6, 9 (directing state to establish $5 million endowments for purposes of increasing racial diversity at Jackson State University and Alcorn State University, including by establishing other-race scholarship programs); Settlement Agreement, appended to Minute Entry, *United States v. Louisiana*, Civ. No. 80-3300 (E.D. La. Nov. 14, 1994), at 19 ¶ 21 ("significant financial assistance" to be provided for African-American law students at LSU Law Center), 21 ¶ 22.3 ($900,000 per year to be provided for scholarships for other-race doctoral candidates at predominantly white institutions), 22 ¶ 22.f ($700,000 per year for other-race graduate scholarships to be provided at Southern University campuses); *Knight v. State of Alabama*, 787 F. Supp. 1030, 1292-97 (N.D. Ala. 1991) (favorably describing other-race financial aid offered to promote increased African-American enrollment in traditionally white Alabama institutions of higher education), *aff'd in part, rev'd in part, vacated in part and remanded on other grounds*, 14 F.3d 1534 (11th Cir. 1994); *Geier v. Alexander*, 593 F. Supp. 1263, 1270 (M.D. Tenn. 1984) (approving pre-professional program and scholarships for black students as part of settlement of issues in higher education desegregation suit between private plaintiffs and state, and binding intervenor United States to terms), *aff'd*, 801 F.2d 799 (6th Cir. 1986).[20]

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[20]The U.S. Department of Education and its predecessor agency have approved and encouraged the use of other-race scholarship programs in state desegregation efforts pursuant to Title VI, 42 U.S.C. § 2000d (1994). *See Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Higher Education*, 43 Fed. Reg. 6658, 6662 (Feb. 15, 1978), ¶ II.H.; UX 84, attachment at 3 (1985 OCR recommendation that Maryland increase number and amount of other-race scholarships); 59 Fed. Reg. 8756 (February 23, 1994).

The Approach of the Court Below Allows Insufficient Room for Necessary Race-Conscious Remedial Steps

The decision below subjects Maryland's use, in 1989, of these same tools not just to "strict scrutiny," but rather to a "presumption" of unlawfulness, *see* 38 F.3d at 152, 6a. In spite of the undisputed background of segregation and official discrimination at UMCP and in spite of the unquestioned remedial purpose that led to the creation of the Banneker Program, the court below treated the State of Maryland as if it were the City of Richmond in the *Croson* case, lacking any documented history of past discrimination in the domain of its affirmative action plan. Viewed in that light, it is hardly surprising that the Banneker Program -- once uprooted from the legacy of segregation that spurred its creation -- was found not "narrowly tailored." Applying a presumption of illegality even in cases of proven prior discrimination leaves virtually no room at all for remedial affirmative action, no matter how carefully structured. It amounts to "a rule of automatic invalidity for racial preferences in almost every case," *Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in the judgment), and it presents states that formerly operated racially dual systems with a severe dilemma -- they can do nothing and wait to be sued by African-American citizens or the federal government, or they can attempt to address their problems frontally and creatively and risk being sued by whites, who already enjoy disproportionate access to the benefits of public higher education.

The effect of applying a presumption of unlawfulness even to a remedial affirmative action plan adopted after an unambiguous finding of past discrimination is illustrated by the panel's cramped and error-laden analysis of features of the Banneker Program that it found to be indicators that the program was not "narrowly tailored." For example, the panel ruled that "[i]f the purpose of the [Banneker] program

was to draw only high-achieving African-American students to [UMCP], it could not be sustained. High achievers, whether African-American or not, are not the group against which the University discriminated in the past." 38 F.3d at 158, 20a. Not only does this pronouncement lack any support whatsoever in the record of this litigation -- indeed, the record contradicts it -- it is flatly belied by a history of pre-1954 educational segregation in the southern and border states of this nation that is so well established that it is subject to judicial notice. *All* African-Americans, notwithstanding their academic potential or their place of residence, were barred from Maryland's flagship institution and its professional schools for more than a century. Of course, the tragedy of this history is that we can never know how many more Thurgood Marshalls might have emerged from Maryland to enrich the State's citizenry and the history of our country if there had been equal educational opportunity even for "high achievers" who were black.

Moreover, the purpose of the Banneker Program is not solely to benefit high-achieving African Americans. Banneker Scholars serve as positive role models and mentors, helping to break down racially hostile attitudes at UMCP and to stimulate increased black enrollment, see *supra* p. 7-8. The panel dismissed this remedial purpose based upon its reading of *Wygant*, 38 F.3d at 159, 21a-22a. But in *Wygant* the "role model theory" was advanced by a school board which *denied* any past discrimination as a justification for racial preferences in making layoffs. Here, the underlying remedial purpose is indisputable, and UMCP seeks merely to take advantage of the "role model" phenomenon to assist in remedying the lingering effects of prior discrimination in admitting and treating African Americans at the school. Nothing in *Wygant* rules out otherwise permissible affirmative action merely because it is

designed to take advantage of "role modeling" opportunities to combat prejudice and stereotyping.

Finally, applying a presumption of invalidity despite the University's remedial purpose led the panel to question UMCP's flexible admissions process in assessing whether there was still underrepresentation of African Americans at the school that could be ameliorated by the Banneker Program. Although acknowledging that there are no minimum criteria for admission, 38 F.3d at 157 n.5, 16a n.5, the panel held that "the district court should have determined what the *effective minimum criteria for admission were* by determining the lowest GPA and SAT scores achieved by admittees to the University that year," *id.* (emphasis added), and then calculated the pool of potential African-American applicants who met those "effective minimum criteria." This approach ignores the fact that the lowest GPA and SAT scores of a particular entering freshman class are an artifact of the overall characteristics of the applicant pool in that year, and not a reflection of the "unspoken" but "effective" real minimum criteria for admission, and the fact that UMCP officials may at any time accept another candidate with a lower average or score than anyone already granted admission if they conclude that the candidate has the ability, overall, to succeed at the school.[21]

If the ruling below is permitted to stand, neither college and university staffs, states, federal courts nor the United States Department of Education will have any way of knowing whether other-race scholarships such as those awarded under the Banneker program at UMCP are to be

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[21]Even if the panel were correct, that could not support its holding that Podberesky was entitled to judgment as a matter of law. Underrepresentation was only one of the continuing effects of past discrimination identified by the District Court to which the Banneker Program was addressed.

viewed as constitutional remedies or constitutional violations, even in states with long histories of operating racially dual systems of higher education. The decision of the Fourth Circuit in this case, therefore, presents questions of overwhelming national importance that demand resolution by this Court. The Court should issue the writ for this purpose.

II

The Decision Below Rests Upon A Wholly Erroneous View of Statistical Proof in Discrimination Cases that Is Contrary to the Explicit Teaching of this Court in *Bazemore v. Friday*, 478 U.S. 385 (1986), a Ruling in Which This Court Reversed the Same Court of Appeals for the Same Error

In *Bazemore v. Friday*, 751 F.2d 662, 671-72 (4th Cir. 1984), a panel of the Fourth Circuit reviewed the district court's judgment in a suit charging discrimination in compensation against African-American employees of the North Carolina Agricultural Extension Service. The plaintiffs' expert witness had prepared regression analyses which, he testified, indicated that race was a factor accounting for then-current salary disparities between white and black county agents. The defendants' expert witness also prepared regression analyses using the same variables and interpreted the results differently from the plaintiffs' witness. The Court of Appeals affirmed the district court's decision to reject the testimony of plaintiffs' expert about the multiple regression findings in its entirety "because the plaintiffs' expert had not included a number of variable factors the court considered relevant," *id.* at 672.

This Court reversed, *Bazemore v. Friday*, 478 U.S. 385, 387, 400-01 (1986). It held that the inclusion or non-inclusion from a statistical regression equation of additional

factors which might have explanatory value goes only to the probative weight of the evidence, but that it was error to exclude such evidence from consideration entirely because the fact-finder hypothesized that there might be alternative justifications for the observed disparities. The Court suggested that defendants in such cases should not merely criticize the plaintiffs' analyses but should come forward with their own regression tables to rebut whatever showing is made by the plaintiffs.

The panel below made the same error as in the earlier case. The parties to this lawsuit offered different interpretations of statistical data in several categories as appropriate indicators of the pool of qualified potential applicants to UMCP, in light of the fact that the University did not have rigid eligibility criteria (see *supra* note 13). The district court carefully reviewed the evidence presented by the parties and their contentions, ultimately rejecting some arguments made by both sides but determining that at least as late as 1991-92, black students were underrepresented at UMCP in comparison to appropriate "pool" measures. *See* 838 F. Supp. at 1087-89, 63a-69a. The court below, however, held that the district court erred by not including in its analysis a number of other variables that had not been quantified in any evidentiary presentation by respondent but which the panel thought might have explanatory power. 38 F.3d at 159-60, 21a-25a. "[T]he reference pool must factor out, to the extent practicable, all nontrivial, non-race-based disparities in order to permit an inference that such, if any, racial considerations contributed to the remaining disparity. This the district court simply has not done." *Id.* at 160, 24a.[22]

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[22]Compare the language in *Bazemore*, 751 F.2d at 672: "An appropriate regression analysis of salary should therefore include all measurable variables thought to have an effect on salary level."

The panel thus made the same error as in *Bazemore*;[23] this Court should issue the writ to correct it.

III

Since the Court Below Concluded that There Were Genuine Disputes about Facts Material to the Cross-Motions for Summary Judgment, It Acted Contrary to FED. R. CIV. P. 56(c) and the Decisions of this Court in Directing the Trial Judge to Enter Summary Judgment for the Plaintiff on Remand

The responsibility of the court below, in passing upon the parties' appeals from the District Court's disposition of

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[23]In this portion of the opinion the panel also made a different and significant error. It held that the reference pool of potential African-American applicants to UMCP should have been reduced to reflect "that percentage of otherwise eligible African-American high school graduates who . . . voluntarily limited their applications to Maryland's predominantly African-American institutions," *id.* at 159-60, 23a (footnote omitted), adding that it

> infer[red] that significant numbers of UMCP-eligible Maryland African-Americans do choose to go to the [historically] predominantly African-American Maryland schools, such as Coppin State, Bowie State, and UM Eastern Shore, whether their reasons are economic, academic, geographic, or cultural, because the percentages of African-Americans in the student bodies at those schools are so high,"

id. at 159-60 & n.13, 23a & n.13. Since one of the underlying issues in these cases is whether currently existing racial patterns of enrollment decisions are influenced by policies and practices traceable to the prior dual system, *see Fordice*, 112 S. Ct. at 2737, the panel's approach to this question would have the effect of excluding highly probative evidence from the statistical analysis. In short, the panel would preclude any finding of continuing underrepresentation of blacks at UMCP so long as their "college attendance [at the State's historically black institutions] is by choice and not by assignment" -- the very position rejected by this Court in *Fordice*, *see* 112 S. Ct. at 2236.

the cross-motions for summary judgment, was "to assess the record under the standard set forth in Rule 56 of the Federal Rules of Civil Procedure," *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883-84 (1990).

> Rule 56(c) states that a party is entitled to summary judgment in his favor "if the pleadings, depositions, answers to interrogatories, and admissions on file, if any, show that there is *no genuine issue as to any material fact* and that the moving party is entitled to a judgment as a matter of law."

Id. at 884 (emphasis added). The panel applied this standard when it determined that the District Court erred in granting summary judgment for the defendant parties because, "[t]aking the facts [proffered] in the light most favorable to Podberesky, the non-moving party, . . . [there were] factual disputes in this case [that] are not inconsequential and could have been resolved only at trial." 38 F.3d at 156, 157, 14a, 18a. However, the panel completely ignored these asserted factual controversies when it directed the District Court to enter summary judgment for Podberesky on remand. This fundamental error warrants review and correction by this Court to assure that the summary judgment process in the federal courts functions properly.[24]

In an early section (*II*) of its opinion, the panel reviewed the four present effects of past discrimination identified by the District Court. Two, it held, were insufficient as a matter of law to justify continued race-conscious action. See *supra* p. 14.[25] But as to the

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[24]The Court has demonstrated its concern for these issues in recent years. *See, e.g., Lujan*; *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986).

[25]Neither of these points, we believe, warranted summary judgment for Podberesky. In brief, the panel viewed the availability of Banneker

remaining "two effects that rely on statistical data," the panel said, the "district court erred in its analysis of the under-representation evidence and the attrition evidence for a fundamental reason . . . [a] district court may not resolve conflicts in the evidence on summary judgment motions . . . [as it did] here." 38 F.3d at 155, 13a. When it turned to the denial of plaintiff's cross-motion for summary judgment, the panel focused on the same issues -- underrepresentation and attrition. *Id.* at 157-58, 18a-19a. In this part of the opinion, however (and despite the panel's apparent disclaimer[26]), the court simply ignored the implication of its earlier recognition that there were factual disputes that could be resolved only at trial: *there was enough evidence introduced in support of the positions of the defendant parties to create triable issues and to prevent summary disposition.*[27]

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scholarships to non-residents and to high-achieving students as being divorced from properly remedial purposes; but, as we have previously pointed out, UMCP excluded *all* African-Americans, resident and non-resident, high-achieving and not-so-high-achieving, for many years.

[26]At the beginning of its discussion about the propriety of denying Podberesky's cross-motion for summary judgment, the panel said, "[e]ven if we assumed that the University had demonstrated that African-Americans were underrepresented at the University and that the higher attrition rate was related to past discrimination, we could not uphold the Banneker Program [because i]t is not narrowly tailored . . . ," 38 F.3d at 157-58, 18a-19a (footnote omitted). But in the balance of its discussion, the panel not only failed to make this assumption but instead sharply criticized the District Court's assessment of the evidence introduced by the parties on these questions, *see id.* at 159-61, 19a-27a, and commented that "[i]t is difficult to determine whether the Banneker scholarship program is narrowly tailored to remedy the present effects of discrimination when the proof of present effects is so weak," *id.* at 158, 19a.

[27]The panel began this last section of its opinion with the comment that "[i]n our first opinion in this case, we required that should no further evidence be available upon remand, summary judgment for Podberesky should be granted," *id.* at 161, 28a. Extensive additional evidence about

Instead, the panel ignored that factual record; it characterized the State's position on underrepresentation as "rest[ing] on . . . unsupported assumption[s]," *id.* at 160, 25a and it opined, contrary to the declarations and affidavits of both Maryland officials and numerous Presidents and Chancellors of colleges and universities in the United States, that "[t]he causes of the low retention rates submitted both by Podberesky and the University and found by the district court have little, if anything, to do with the Banneker Program," *id.* at 161, 27a.

The standards of FED. R. CIV. P. 56(c), like other provisions of the Federal Rules, apply equally to plaintiffs and defendants, *see, e.g., Anderson v. City of Bessemer City*, 470 U.S. 564 (1985) (Rule 52); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982) (same). The court below failed to follow this bedrock principle in deciding this case, and its error merits correction by this Court.[28]

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racial discrimination in Maryland's higher education system and its continuing effects was put before the District Court upon that remand, including, as indicated in the text, sufficient evidence to warrant summary judgment for the defendant parties, or at a minimum a trial, rather than the grant of summary judgment. Nevertheless, the panel suggested that respondent was entitled to summary judgment in *his* favor pursuant to the earlier remand instructions. The panel nowhere explained this contradiction.

[28]Indeed, this error is so clear and unambiguous that the Court may wish to reverse summarily on this ground and remand the case to the District Court with instructions to conduct a trial.

Conclusion

For the foregoing reasons, petitioners Monica Greene, *et al.*, respectfully pray that the Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in this matter.[29]

Respectfully submitted,

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[29]Greene Petitioners note that the second Question Presented in the separate Petition of William E. Kirwan, *et al.* was presented to, but not decided by, either court below. However, the judgment below implicitly decides it adversely to the State of Maryland, in directing the entry of summary judgment in favor of plaintiff Podberesky. That question will be moot if this Court reverses the Fourth Circuit on the other grounds urged in both petitions. If the Court does not, it may wish to vacate and remand so that the question may be explicitly considered by the District Court and the Court of Appeals.